Title	**Revision of Appellate Rules: Fourth Installment, Part Two** (repeal Cal. Rules of Court, rules 40, 40.5, 41, 42, 43, 44, 45, 45.1, 45.5, 46, 46.5, 47, 48, 51, 52, 52.5, 53, 54, 54.5, 55, 75, 76, 76.1, 76.5, 76.6, 77, 78, 80, 976, 976.1, 977, 978, 979; adopt revised rules 40, 40.1, 40.2, 40.5, 41, 42, 43, 44, 45, 46, 46.5, 47, 48, 51, 52, 53, 54, 70, 71, 75, 76, 76.5, 76.6, 77, 78, 80, 976, 976.1, 977, 978, 979; amend rules 2, 15, 30.1).
Summary	This proposed revision of portions of the California Rules of Court covers rules governing general appellate procedures, appellate court administration, and publication of appellate opinions. It is intended to clarify the meaning of the rules and facilitate their use by practitioners, parties, and court personnel. This installment completes the project to revise the appellate rules.
Source	Appellate Advisory Committee Justice Joyce L. Kennard, Chair
Staff	Peter Belton, Chair, Appellate Rules Project Task Force 415-865-7094 peter.belton@jud.ca.gov Heather Anderson, Committee Counsel 415-865-7691 heather.anderson@jud.ca.gov
Discussion	Under the direction of the Appellate Advisory Committee, the Appellate Rules Project Task Force—consisting of appellate practitioners, judicial staff attorneys, the Reporter of Decisions, and an associate justice of the Supreme Court—is developing proposals for revising the appellate rules of the California Rules of Court in a series of installments. The first installment (revised rules 1–18) was adopted by the Judicial Council and took effect on January 1, 2002. The second installment (revised rules 19–29.9, new rules 36.1, 36.2, and 47.1, amended rules 5, 13, and 40) was adopted by the Judicial Council and took effect on January 1, 2003. The third installment (revised rules 30–36.3, amended rules 36.1 and 36.2) was adopted by the Judicial Council and took effect on January 1, 2004. The first part of the fourth installment (proposed revised rules 39–39.8, 49–50, 56–60) was the subject of public comment and is currently being revised. The Appellate Advisory Committee now invites public comment on the second part of the fourth installment, attached to this report. It

proposes to revise the Rules of Court governing general appellate procedures (rules 40, 40.5, 41–44, 45, 45.1, 46, 46.5, 47, 48, 51–52, 52.5, 53–54, 54.5; proposed rules 40, 40.1, 40.2, 40.5, 41–45, 45.1, 45.5, 46, 46.5, 47–48, 51–54), appellate court administration (rules 55, 75–76, 76.1, 76.5, 76.6, 77–78, 80; proposed rules 70–71, 75, 76.1, 76.5, 76.6, 77–78, 80), and publication of appellate opinions (rules 976, 976.1, 977–979, proposed rules 976, 976.1, 977–979), and to amend rules 2, 15, and 30.1. This installment completes the project to revise the appellate rules.

The main goals of the project are to clarify the meaning of the rules and facilitate their use by practitioners, parties, and court personnel by:

- simplifying wording;
- resolving ambiguities;
- eliminating redundant and obsolete provisions;
- conforming older rules to current practice;
- removing inconsistencies in style and terminology;
- restructuring individual rules into subdivisions to promote readability and understanding;
- rearranging the sequence of subdivisions and rules as logic dictates;
- making substantive changes when necessary to fill gaps in rule coverage, to conform to current practice, or to improve the appellate process;
- identifying substantive and structural changes to the rules through explanatory Advisory Committee Comments that will be published with the rules; and
- recommending format and style guidelines.

A breakdown follows of the rules covered in this installment and the principal substantive changes proposed.

General appellate procedures

Proposed rules 40, 40.1, 40.2, 40.5, 41–45, 45.1, 45.5, 46, 46.5, 47–48, and 51–54 would restate in revised form the rules governing general appellate procedures (current rules 40, 40.5, 41–44, 45, 45.1, 46, 46.5, 47, 48, 51–52, 52.5, 53–54, 54.5). Few substantive changes are proposed.

New rule 40.1 would restate provisions of former rule 40(e), (f), (i), and (k) on the subject of serving and filing documents in the superior courts and reviewing courts. The sole substantive change appears in

subdivision (b)(3)(A); this provision tracks a proposed change in current rule 40(k) that is separately circulating for public comment.

Current rule 41(a) measures the time to file any opposition to a motion from the date that the motion was *served.* The actual date of service, however, is not always clear. In a substantive change intended to assist the reviewing courts, revised rule 41(a)(3) would instead measure the time to file any opposition to a motion from the date that the motion is *filed.* Under current rule 41(a) any opposition must be served and filed within 10 days after the motion is served; under revised rule 41(a)(3) that period would be 15 days after the motion is filed.

Current rule 42(a), which specifies the contents of a certificate or declaration supporting a motion to dismiss an appeal before the record is filed, is underinclusive. Revised rule 42(a) would broaden the wording of the rule in several respects to make it consistent with practice and facilitate its use.

Current rule 44(b) prescribes the number of copies required when filing briefs, papers, or documents other than the record. Revised rule 44(b) would update these requirements to conform to the practices of the reviewing courts. For example, revised rule 44(b) would require that a reply to an opposition to a petition in the Supreme Court be filed in an original and 10 copies; that a party filing a civil brief in the Court of Appeal serve four, rather than five, copies of that brief on the Supreme Court; and that a reply to an opposition to a petition in the Court of Appeal be filed in an original and four copies. Revised rule 42(c), which specifies the colors of the covers of briefs and petitions, would add several types of frequently filed documents.

Revised rule 44(b)(3) is new. Like former rule 44(b)(2)(B) and (C), revised rule 44(b)(2)(B) and (C) requires that certain documents be filed in the Court of Appeal in an original and multiple copies. But the party may wish to accompany such a filing with supporting documents, and in some cases those documents may be voluminous. To relieve the party of the burden of preparing—and the court of the burden of processing and storing—multiple copies of voluminous supporting documents, it is the practice of several Courts of Appeal to require only one set of any documents that a party may wish to file in support of a filing under rule 44(b)(2)(B) or (C). Revised rule 44(b)(3) reflects that practice, but recognizes that the courts may wish to order otherwise by local rule or in individual cases. A similar provision

appears in proposed revised rule 56(d)(3), governing original writ proceedings in the reviewing courts; it has been the subject of public comment and awaits review by the Appellate Advisory Committee.

Current rule 45 contains numerous provisions on extending and shortening the time to do various acts required or permitted under the appellate rules. Revised rule 45 would simplify the rule by recognizing that some of its provisions have been moved to more appropriate rules and others are unnecessary. No substantive change is intended.

Current rule 48(a) provides a multi-step procedure for substitution of parties to a pending appeal, including proceedings in the superior court; in practice, however, the reviewing courts employ a simpler and more direct method. Revised rule 48(a) would reflect that method, requiring only the serving and filing of a motion to substitute in the reviewing court. Similarly, current rule 48(b) provides for substitution of attorneys in a pending appeal by either a stipulation or a motion in the reviewing court; in practice, however, parties simply serve and file a substitution of attorneys in the reviewing court (see Form MC–050 [*Substitution of Attorney–Civil*]). Revised rule 48(b) would conform to that practice. Current rule 48(b) also requires an attorney wishing to withdraw from an appeal to serve and file either a stipulation or a motion in the reviewing court. In practice, however, an attorney does so simply by filing a motion with proof of service on the party represented and any other attorneys or unrepresented parties in the case. Revised rule 48(c) would conform to that practice.

Appellate court administration

Proposed rules 70, 71, 75, 76.1, 76.5, 76.6, 78, and 80 would restate in revised form the rules governing appellate court administration (current rules 55, 75–76, 76.1, 76.5, 76.6, 77–78, 80). Few substantive changes are proposed.

Current rule 76.6 prescribes the qualifications of appointed counsel in death penalty appeals and related habeas corpus proceedings. Subdivision (c)(3) of the rule defines "associate counsel" simply as an appointed attorney "who does not have the primary responsibility for the case." In revised rule 76.6(c)(3) the definition of associate counsel would add the words, "but nevertheless has casewide responsibility commensurate with the scope of that counsel's appointment as attorney of record." The provision is intended to make it clear that although appointed lead counsel has overall and supervisory

responsibility in a capital case, appointed associate counsel also has casewide responsibility within the scope of his or her appointment as either appellate counsel, habeas corpus counsel, or appellate *and* habeas corpus counsel.

Publication rules
Proposed rules 976, 976.1, and 977–979 would restate in revised form the rules governing the publication of appellate opinions (current rules 976, 976.1, 977–979). Two substantive changes are proposed in the rule on requesting publication.

Current rule 978(a) requires only that a request to publish an unpublished opinion be made "promptly," and does not specify the time within which the Court of Appeal is required to send the Supreme Court a publication request that it has not granted. In practice these provisions have proved to be inadequate: requests to publish are often made after the Court of Appeal has lost jurisdiction, and it is not uncommon for the Court of Appeal to forward such a request after the Supreme Court has denied a petition for review in the same case or, if there is no such petition, has lost jurisdiction to grant review on its own motion. To assist persons wanting to request publication and to give the reviewing courts adequate time to act, revised rule 978(a) would specify that the request must be made within the time allowed to file a petition for rehearing in the reviewing court, and revised rule 978(b)(1) would require the Court of Appeal to forward the request to the Supreme Court within 15 days after the decision is final in the Court of Appeal.

Amendments to rules 2, 15, and 30.1
Current rule 45(c) provides that the time to file a notice of appeal may not be extended. It is important to advise litigants of this provision as soon as possible because an untimely filing results in the drastic consequence of the dismissal of the appeal under rule 2(e). In a proposed amendment to rule 2, both these provisions would be combined and moved to a more logical and prominent position (new rule 2(b)). For the same reason a similar amendment is proposed to rule 30.1(a), which governs the time to appeal in criminal cases.

Current rule 44 requires a party filing a civil brief in the Court of Appeal to serve a specified number copies of that brief on the Supreme Court, but is silent on the situation in which the Court of Appeal orders the brief to be sealed. In response to a suggestion by the Supreme Court, a rule amendment is proposed to preserve the purpose

of the order sealing the brief in that situation by requiring the party to file all copies of the brief in an envelope that identifies its contents as being under seal, and directing the Supreme Court clerk to keep them under seal in the absence of an order unsealing the brief. This amendment would appear in rule 15(c), where it would more easily come to the attention of counsel.

Advisory Committee Comments
Because of the extensive revisions and restructuring of these proposed rules, specific changes are not indicated by the usual underscoring and ~~strikethrough~~ of the text. Instead, please refer to the proposed ***Advisory Committee Comment*** that follows each rule, which explains the source of its provisions and any substantive change in the rule. Although most of the proposed revisions are either stylistic or structural, any substantive changes are identified and explained in the comments. If a change is not specifically discussed, it should be presumed that the change is not intended to be substantive. The Advisory Committee Comments are proposed for adoption by the council as official interpretive history, and for inclusion in all published versions of the revised rules. Because the Advisory Committee Comments contemplate adoption of the revised rules, the comments refer to the current rules as "former" rules and to the proposed rules as "revised" rules.

Attachments

Rules 40, 40.5, 41, 42, 43, 44, 45, 45.1, 45.5, 46, 46.5, 47, 48, 51, 52, 52.5, 53, 54, 54.5, 55, 75, 76, 76.1, 76.5, 76.6, 77, 78, 80, 976, 976.1, 977, 978, and 979 would be repealed; revised rules 40, 40.1, 40.2, 40.5, 41, 42, 43, 44, 45, 46, 46.5, 47, 48, 51, 52, 53, 54, 70, 71, 75, 76, 76.5, 76.6, 77, 78, 80, 976, 976.1, 977, 978, and 979 would be adopted; and rules 2, 15, and 30.1 would be amended, effective January 1, 2005.

PART IX. General Appellate Procedures

Rule 40. Definitions

Unless the context or subject matter requires otherwise, the following definitions apply to Title 1 of these rules.

(a) Appellant, respondent, and party

(1) "Appellant" means the appealing party; "respondent" means the adverse party.

(2) "Party" includes any attorney of record for that party.

(b) Gender, tense, and number

Each gender (masculine, feminine, or neuter) includes the others; each tense (past, present, or future) includes the others; each number (singular or plural) includes the other.

(c) Judgment

"Judgment" includes any judgment or order that may be appealed.

(d) Must, may, and may not; should; will

(1) "Must" is mandatory; "may" is permissive; "may not" means "is not permitted to."

(2) "Should" expresses a preference or a nonbinding recommendation.

(3) "Will" expresses a future contingency or predicts action by a court or a judicial officer.

(e) Superior and reviewing courts

(1) "Superior court" means the court from which an appeal is taken.

(2) "Reviewing court" means the Supreme Court or the Court of Appeal to which an appeal is taken, in which an original proceeding is begun, or to which an appeal or original proceeding is transferred.

Advisory Committee Comment

Former rule 40(f), (i), (k), and the second sentence of former rule 40(e) have been moved to new rule 40.1 on service and filing.

Former rule 40(j) defined *register* and *register of actions* to mean the permanent record of cases maintained by electronic, magnetic, microphotographic, or similar means. The topic is covered more fully in rule 55.

Former rule 40(*l*) has been moved to new rule 40.2 on recycled paper.

Former rule 40(h) has been deleted as unnecessary.

Rule 40.1 Service and filing

(a) Service

(1) Before filing any document in a court, a party must serve, by any method permitted by the Code of Civil Procedure, one copy of the document on the attorney for each party separately represented and on each unrepresented party.

(2) The party must attach a proof of service to the document presented for filing. The proof must name each party represented by each attorney served.

(b) Filing

(1) A document is deemed filed on the date the clerk receives it.

(2) Except as provided in (3), a filing is not timely unless the clerk receives the document before the time to file it expires.

(3) A brief, petition for rehearing, answer to a petition for rehearing, petition for review, answer to a petition for review, or reply to an answer to a petition for review is timely if the time to file it has not expired on the date of:

(A) its mailing by priority or express mail as shown on either the postmark or a certificate of mailing provided by the United States Postal Service, or

(B) its delivery to a common carrier promising overnight delivery as shown on the carrier's receipt.

(4) The provisions of (3) do not apply to original proceedings.

Advisory Committee Comment

New rule 40.1 restates provisions of former rule 40(e), (f), (i), and (k) on the subject of serving and filing documents in the superior courts and reviewing courts.

Subdivision (a). Former rule 40(f) required service "in a manner permitted by law"; revised rule 40(a)(1) more specifically requires service "by any method permitted by the Code of Civil Procedure." The reference is to the several permissible methods of service provided in Code of Civil Procedure sections 1010-1020.

Rule 40.2 Recycled paper

When these rules require the use of recycled paper, the attorney, party, or other person serving or filing a document certifies, by that act, that the document was produced on recycled paper as defined by Public Resources Code section 42202.

Advisory Committee Comment

New rule 40.2 restates former rule 40(*l*).

Rule 40.5 Notice of change of address

(a) Serving and filing notice

(1) An attorney or unrepresented party whose address or telephone number changes while a case is pending in a reviewing court must promptly serve and file a written notice of the change in that court.

(2) The notice must specify the title and number of the case or cases to which it applies. If an attorney gives the notice, it must include the attorney's California State Bar membership number.

(b) Matters affected by notice filed by attorney

Unless the person giving the notice advises the reviewing court clerk otherwise in writing, the clerk may use the new address or telephone number in all pending and concluded cases.

(c) Appearance not conforming to address of record; multiple offices

(1) The clerk must enter a proposed appearance in a new matter even if it shows an attorney's address different from the address of record; but the appearance is subject to being struck if, after inquiry by the court, the attorney does not promptly confirm the address or serve and file a change of address.

(2) Attorneys with two or more offices may have a corresponding number of addresses of record, but only one address may be associated with a given case.

Advisory Committee Comment

Subdivision (a). Former rule 40.5(a) required that a notice of change of address or telephone number specify the number of the case to which it applied. Filling a gap, revised rule 40.5(a) requires the notice also to specify the case title.

Subdivision (b). Former rule 40.5(b) was limited on its face to notices filed by attorneys. Filling a gap, revised rule 40.5(b) includes notices filed by unrepresented parties.

Rule 41. Motions in the reviewing court

(a) Motion and opposition

(1) Except as these rules provide otherwise, to make a motion in a reviewing court a party must serve and file a motion stating the grounds and the relief requested and identifying any documents on which it is based.

(2) A motion must be accompanied by points and authorities and, if it is based on matters outside the record, by declarations or other supporting evidence.

(3) Any opposition must be served and filed within 15 days after the motion is filed.

(b) Disposition

(1) The court may rule on a motion at any time after opposition is filed or the time to oppose has expired.

(2) On a party's request or its own motion, the court may place a motion on calendar for a hearing. The clerk must promptly send each party a notice of the date and time of the hearing.

(c) Failure to oppose motion

A failure to oppose a motion may be deemed a consent to the granting of the motion.

Advisory Committee Comment

Subdivision (a). Former rule 41(a) measured the time to file any opposition to a motion from the date that the motion was *served*. The actual date of service, however, was not always clear. In a substantive change intended to assist the reviewing courts, revised rule 41(a)(3) instead measures the time to file any opposition to a motion from the date that the motion is *filed*. Under former rule 41(a) any opposition had to be served and filed within 10 days after the motion was served; under revised rule 41(a)(3) that period is 15 days after the motion is filed.

Subdivision (b). Former rule 41(b) declared that a motion would be deemed made "on all the grounds stated therein." Revised rule 41 deletes this provision as superfluous.

Rule 42. Motions before the record is filed

(a) Motion to dismiss appeal

A motion to dismiss an appeal before the record is filed in the reviewing court must be accompanied by a certificate of the superior court clerk, a declaration, or both, stating:

(1) the nature of the action and the relief sought by the complaint and any cross-complaint or complaint in intervention;

(2) the names, addresses, and telephone numbers of all attorneys of record—stating whom each represents—and unrepresented parties;

(3) a description of the judgment or order appealed from, its entry date, and the service date of any written notice of its entry;

(4) the factual basis of any extension of the time to appeal under rule 3;

(5) the filing dates of all notices of appeal and the courts in which they were filed;

(6) the filing date of any document necessary to procure the record on appeal; and

(7) the status of the record preparation process, including any order extending time to prepare the record.

(b) Other motions

Any other motion filed before the record is filed in the reviewing court must be accompanied by a declaration or other evidence necessary to advise the court of the relevant facts.

Advisory Committee Comment

Subdivision (a). Filling gaps, revised rule 42(a)(2) requires the certificate or declaration to state the addresses and telephone numbers of all attorneys of record and all unrepresented parties, and the name of the party represented by each attorney.

Former rule 42(a)(4)–(5) required the certificate or declaration to state the filing date of any notice of intention to move for a new trial, the date and content of any ruling on that motion, and the service date of notice of that ruling. But these facts were relevant only insofar as they reflected one ground to extend the time to appeal under rule 3. The provision was underinclusive, because rule 3 recognizes additional grounds to extend the time to appeal. In a substantive change, revised rule 42(a)(4) therefore requires instead that the certificate or declaration state the factual basis of "any extension of the time to appeal under rule 3."

Former rule 40(a)(7) specified several documents whose filing date the certificate or declaration was required to state. But these documents were relevant only insofar as they affected the process of procuring the record on appeal. The provision was underinclusive, because other documents may also be relevant to that process. In a substantive change, revised rule 42(a)(6) therefore requires instead that the certificate or declaration state the filing date of "any document necessary to procure the record on appeal."

Former rule 42(a)(8) required the certificate or declaration to state the date of "certification" of the record or "the facts relating to failure to certify." But the rules on appeals in civil and noncapital criminal cases contain no procedure for certifying the *record*; and no party may make a motion to *dismiss* an appeal in death penalty appeals, which are taken automatically (revised rule 34(a)). Former rule

42(a)(8) also required the certificate or declaration to state the fact that no proceeding for record preparation was pending in superior court or that the time to institute such a proceeding had expired. Revised rule 42(a)(7) focuses the provision on its purpose by requiring the certificate or declaration to state "the status of the record preparation process," including any order extending time to prepare the record.

Rule 43. Applications in the reviewing court

(a) Service and filing

Except as these rules provide otherwise, parties must serve and file all applications, including applications to extend the time to file records, briefs, or other documents, and applications to shorten time. For good cause, the Chief Justice or presiding justice may excuse advance service.

(b) Contents

The application must state facts showing good cause for granting the application and identify any previous application filed by any party.

(c) Disposition

Unless the court determines otherwise, the Chief Justice or presiding justice may rule on the application.

Advisory Committee Comment

Subdivision (a). Former rule 43 provided that the Chief Justice or presiding justice "may require an additional showing to be made" to support an application to the reviewing court. This provision in effect duplicated the rule's subsequent provision requiring the application to state facts showing good cause for granting the application. Revised rule 43(a) deletes the provision for an "additional showing" but revised rule 43(b) retains the requirement of a showing of good cause. The change is not substantive.

Former rule 43 required an applicant to provide the reviewing court clerk with addressed, postage-prepaid envelopes for mailing copies of the disposition order to all parties. In practice, however, such envelopes have proved to be an unnecessary complication in the clerks' ordinary mailing procedure. In a substantive change, revised rule 43 deletes the requirement.

Rule 44. Form, number, and cover of documents filed in the reviewing court

(a) Form

Except as these rules provide otherwise, documents filed in a reviewing court may be either produced on a computer or typewritten and must comply with the relevant provisions of rule 14(b).

(b) Number of copies

The following number of copies must be filed of every brief, petition, motion, or other document, except the record, filed in a reviewing court:

(1) If filed in the Supreme Court:

(A) an original and 13 copies of a petition for review, an answer, a reply, a brief on the merits, a petition for rehearing, or an answer to a petition for rehearing;

(B) an original and 10 copies of a petition for a writ within the court's original jurisdiction, an opposition or other response to the petition, or a reply;

(C) an original and 8 copies of a petition for review to exhaust state remedies, an answer, or a reply;

(D) an original and 8 copies of a motion and an opposition or other response to a motion; and

(E) an original and one copy of any other document.

(2) If filed in a Court of Appeal:

(A) an original and 4 copies of a brief and, in civil appeals, proof of delivery of 4 copies to the Supreme Court;

(B) an original and 4 copies of a petition, an answer, an opposition or other response to a petition, or a reply;

(C) an original and 3 copies of a motion and an opposition or other response to a motion, and

(D) an original and one copy of any other document.

(3) Unless the Court of Appeal orders otherwise, only one set of any supporting documents accompanying a document filed under (2)(B) or (C) need be filed.

(c) Cover color

(1) As far as practicable, the covers of briefs and petitions must be in the following colors:

Appellant's opening brief or appendix:.....green
Respondent's brief or appendix:.....yellow
Appellant's reply brief or appendix:.....tan
Joint appendix: .....white
Amicus curiae brief:.....gray
Answer to amicus curiae brief: .....blue
Petition for rehearing:.....orange
Answer to petition for rehearing:.....blue
Petition for original writ:.....red
Answer (or opposition) to petition for original writ:.....red
Reply to answer (or opposition) to petition for original writ:....red
Petition for review:.....white
Answer to petition for review:..... blue
Reply to answer to petition for review:.....white
Opening brief on the merits:.....white
Answer brief on the merits:.....blue
Reply brief on the merits:.....white

(2) A brief or petition not conforming to (1) must be accepted for filing, but in case of repeated violations by an attorney or party the court may proceed as provided in rule 14(e).

(d) Cover information

The cover—or first page if there is no cover—of every document filed by an attorney in a reviewing court must comply with rule 14(b)(10)(D).

Advisory Committee Comment

Subdivision (a). Former rule 44(a) required that all copies of documents be clear, legible, and on recycled paper, and encouraged the use of recycled paper for brief covers. Revised rule 44(a) deletes these requirements because they duplicate provisions of rule 14(b), incorporated by reference into the revised rule.

Subdivision (b). Revised rule 44(b)(1)(A) combines former rule 44(b)(1)(A) and (B). Filling gaps, revised rule 44(b)(1)(A) specifies that a petition for rehearing and an answer to such a petition in the Supreme Court must be filed in an original and 13 copies, and revised rule 44(b)(1)(B) specifies that a reply to an opposition to a petition in the Supreme Court must be filed in an original and 10 copies.

Former rule 44(b)(2)(ii) required a party filing a brief in the Court of Appeal in a civil case to attach proof of service of five copies on the Supreme Court. Revised rule 44(b)(2)(A) reduces that number from five to four. If the Court of Appeal ordered such briefs to be sealed, the party must comply with rule 15(c)(2) as amended effective January 1, 2005.

Filling a gap, revised rule 44(b)(2)(B) specifies that a *reply* to an opposition to a petition in the Court of Appeal must also be filed in an original and four copies.

Revised rule 44(b)(3) is new. Like former rule 44(b)(2)(B) and (C), revised rule 44(b)(2)(B) and (C) requires that certain documents be filed in the Court of Appeal in an original and multiple copies. But the party may wish to accompany such a filing with supporting documents, and in some cases those documents may be voluminous. To relieve the party of the burden of preparing—and the court of the burden of processing and storing—multiple copies of voluminous supporting documents, it is the practice of several Courts of Appeal to require only one set of any documents that a party may wish to file in support of a filing under rule 44(b)(2)(B) or (C). Revised rule 44(b)(3) reflects that practice, but recognizes that the courts may wish to order otherwise by local rule or in specific cases.

Subdivision (c). Filling gaps, revised rule 44(c) specifies the color of the following additional documents: appellant's appendix (rule 5.1), respondent's appendix, joint appendix, answer to amicus curiae brief, and reply to answer (or opposition) to petition for original writ.

Rule 45. Extending and shortening time

(a) Computing time

The Code of Civil Procedure governs computing or extending the time to do any act required or permitted under these rules.

(b) Extending time

For good cause and except as otherwise provided in these rules, the Chief Justice or presiding justice may extend the time to do any act required or permitted under these rules. An application to extend time must comply with rule 45.5.

(c) Shortening time

For good cause and except as otherwise provided in these rules, the Chief Justice or presiding justice may shorten the time to do any act required or permitted under these rules.

(d) Relief from default

For good cause, a reviewing court may relieve a party from default for any failure to comply with these rules except the failure to file a timely notice of appeal.

(e) No extension by superior court

A superior court judge may not extend the time to do any act to prepare the appellate record.

(f) Notice to party

(1) In a civil case, counsel must deliver to the client a copy of any stipulation or application to extend time that counsel files. Counsel must attach evidence of such delivery to the stipulation or application, or certify in the stipulation or application that the copy has been delivered.

(2) In a class action, the copy required under (1) need be delivered to only one represented party.

(3) The evidence or certification of delivery under (1) need not include the address of the party notified.

Advisory Committee Comment

Former subdivision (c). Former rule 45(c) provided that the time to file a notice of appeal could not be extended. The provision has been moved to rule 2.

Former rule 45(c) provided that the time to file a petition in the Supreme Court to review a Court of Appeal decision could not be extended. The provision has been moved to rule 28(e)(2).

Former rule 45(c) provided that the time for granting or denying a petition for rehearing in the Court of Appeal could not be extended. The provision has been moved to rule 25(c).

Former rule 45(c) provided that the time for granting or denying a petition for Supreme Court review of a Court of Appeal decision could be extended only as provided in former rule 28(a). The provision is deleted as unnecessary; revised rule 28.2(b) now states the only manner in which the Supreme Court may extend that time.

Former rule 45(c) provided that the time for granting or denying a petition for rehearing in the Supreme Court could be extended only as provided in former rule 24(a). The provision is deleted as unnecessary; revised rule 29.5(c) now states the only manner in which the Supreme Court may extend that time.

Former rule 45(c) included provisions relating to the time to do certain acts under former rules 62 and 63(d). Those rules were repealed effective January 1, 2003.

Former rule 45(c) included a provision authorizing the Chief Justice or presiding justice to relieve a party from default for failure to file a timely petition for review or rehearing. The provision has been moved to rule 25(b)(4) in the case of the Court of Appeal and to rules 28(e)(2) and 29.5(b) in the case of the Supreme Court.

Rule 45.1 Appellate emergencies

(a) Emergency extensions of time

If made necessary by the occurrence or danger of an earthquake, fire, or other public calamity, or by the destruction of or danger to a building housing a reviewing court, the Chair of the Judicial Council, notwithstanding rules 1 through 191, may:

(1) extend by no more than 14 additional days the time to do any act required or permitted under these rules, or

(2) authorize specified courts to extend by no more than 30 additional days the time to do any act required or permitted under these rules.

(b) Applicability of order

(1) An order under (a) must specify whether it applies throughout the state, or only to specified courts, or only to courts or attorneys in specified geographic areas, or in some other manner.

(2) An order of the Chair of the Judicial Council under (a)(2) must specify the length of the authorized extension.

(c) Additional extensions

If made necessary by the nature or extent of the public calamity, the Chair of the Judicial Council may extend or renew an order issued under (a) for an additional period of:

(1) no more than 14 days for an order under (a)(1), or

(2) no more than 30 days for an order under (a)(2).

Advisory Committee Comment

Revised rule 45.1 restates in simpler terms the procedures set forth in former rule 45.1 for granting emergency extensions of time in cases of public calamity, but intends no substantive change.

Subdivision (a). Former rule 45.1(2) authorized the Chair of the Judicial Council to order that "No more than 14 days shall be excluded from any computation of the time" to do any act required or permitted under the rules. Revised rule 45.1 deletes this provision because it in effect duplicates subdivision (a)(1) of the revised rule, which authorizes the Chair to *extend* by the same 14 days the time to do any act required or permitted under the rules. No substantive change is intended.

Rule 45.5 Policies and factors governing extensions of time

(a) Policies

(1) The time limits prescribed by these rules should generally be met to ensure expeditious conduct of appellate business and public confidence in the efficient administration of appellate justice.

(2) A party's entitlement to the effective assistance of counsel includes adequate time for counsel to prepare briefs or other documents that fully advance the party's interests. Adequate time also allows the preparation of accurate, clear, concise, and complete submissions that assist the courts.

(3) For a variety of legitimate reasons, counsel may not always be able to prepare briefs or other documents within the normal rule time. To balance the competing policies stated in (1) and (2), applications to extend time in the reviewing courts must demonstrate good cause under the standards stated in (c). If good cause is shown, time must be extended.

(b) Declaration

(1) An application to extend time must include a declaration stating facts, not merely conclusions, and must be served on all parties.

(2) The application must state:

(A) the due date of the document to be filed;

(B) the length of the extension requested; and

(C) whether there have been any previous extensions and, if so, their length and whether obtained by stipulation or by order.

(c) Factors considered

In determining good cause the court must consider the following factors when applicable:

(1) The degree of prejudice, if any, to any party from a grant or denial of the extension. A party claiming prejudice must support the claim in detail.

(2) In a civil case, the position of the client and any opponent with regard to the extension.

(3) The length of the record, which must be specified, including the number of relevant trial exhibits. In a civil case, a record containing one volume of clerk's transcript or appendix and two volumes of reporter's transcript is considered an average-length record.

(4) The number and complexity of the issues raised, including a description of the issues.

(5) Whether there are settlement negotiations and, if so, how far they have progressed and when they might be completed.

(6) Whether the case is entitled to priority.

(7) Whether counsel responsible for preparing the document is new to the case.

(8) Whether other counsel or the client needs additional time to review the document.

(9) Whether counsel responsible for preparing the document has other time-limited commitments that prevent timely filing of the document. Mere conclusory statements that more time is needed because of other pressing business will not suffice. Good cause requires a specific showing of other obligations of counsel that:

(A) have deadlines that as a practical matter preclude filing the document by the due date without impairing its quality, or

(B) arise from cases entitled to priority.

(10) Illness of counsel, a personal emergency, or a planned vacation that counsel did not reasonably expect to conflict with the due date and cannot reasonably rearrange.

(11) Any other factor that constitutes good cause in the context of the case.

Advisory Committee Comment

Subdivision (a). Revised rule 45.5(a) restates in simpler terms the policies governing extensions of time set forth in former rule 45.5(a), but intends no substantive change.

Subdivision (c). Former rule 45.5(c)(3) stated that the "average-length record" on appeal was one volume of clerk's transcript and two volumes of reporter's transcript. Because the average-length record in appeals from judgments of death is much longer, revised rule 45.5(c)(3) limits the statement to civil cases. The revised rule also adds a reference to appendixes (rule 5.1).

Rule 46. Documents violating rules not to be filed

Except as these rules provide otherwise, the reviewing court clerk must not file any record, brief, or other document that does not conform to these rules.

Advisory Committee Comment

Revised rule 46 adds a proviso noting there are exceptions to this rule (e.g., rule 17(a) and revised rule 56(d)(2)).

Rule 46.5 Sanctions to compel compliance

After a notice of appeal is filed, the failure of a court reporter or clerk to perform any duty imposed by statute or these rules that delays the filing of the appellate record is an unlawful interference with the reviewing court's proceedings and may be treated as such in addition to or instead of any other sanction that may be imposed by law for the same breach of duty. This rule does not limit the reviewing court's power to define and remedy any other interference with its proceedings.

Rule 47. Courts of Appeal with more than one division

Appeals and original proceedings filed in a Court of Appeal with more than one division, or transferred to such a court without designation of a division,

may be assigned to divisions in a way that will equalize the distribution of business among them. The Court of Appeal clerk must keep records showing the divisions in which cases and proceedings are pending.

Advisory Committee Comment

Former rule 47(a) required that assignments of appeals in a multi-division Court of Appeal be made "by the presiding justices successively for periods of one year unless a majority of the judges of the court in the district shall otherwise determine"; former rule 47(b) required that assignment of original proceedings and unassigned motions in such a court be made "as a majority of the judges of the court in the district shall determine." In practice, however, the Courts of Appeal with more than one division have each developed different ways to make such assignments according to their needs. Recognizing this fact, revised rule 47 simply authorizes the courts to make such assignments "in a way that will equalize the distribution of business" among the several divisions. The change is not substantive.

Rule 48. Substituting parties; substituting or withdrawing attorneys

(a) Substituting parties

Substitution of parties in an appeal or original proceeding must be made by serving and filing a motion in the reviewing court. The clerk of that court must notify the superior court of any ruling on the motion.

(b) Substituting attorneys

A party may substitute attorneys by serving and filing in the reviewing court a substitution signed by the party represented, the former attorney, and the new attorney. In all appeals and in original proceedings related to a superior court proceeding, the party must also serve the superior court.

(c) Withdrawing attorney

(1) An attorney may request withdrawal by filing a motion to withdraw, with proof of service on the party represented and any other attorneys or unrepresented parties in the case. The proof of service need not include the address of the party represented.

(2) In all appeals and in original proceedings related to a superior court proceeding, the reviewing court clerk must notify the superior court of any ruling on the motion.

(3) If the motion is filed in any proceeding pending in the Supreme Court after grant of review, the Supreme Court clerk must also notify the Court of Appeal of any ruling on the motion.

Advisory Committee Comment

Subdivision (a). Revised rule 48(a) simplifies and restates former rule 48(a) to conform to good practice. No substantive change is intended.

Subdivision (b). Former rule 48(b) required a party substituting attorneys to serve and file either a stipulation or a motion in the reviewing court. In practice, however, a party does so by serving and filing a "substitution" signed by the party, the former attorney, and the new attorney (see Form MC-050 [*Substitution of Attorney–Civil*]). Revised rule 48(b) conforms to that practice. The change is not substantive.

Former rule 48(b) required the new attorney, following a substitution, to "give notice thereof to all parties." Because such a notice would duplicate the requirement of revised rule 48(b) that the substitution be *served*, it is deleted.

Subdivision (c). Former rule 48(b) required an attorney wishing to withdraw to serve and file either a stipulation or a motion in the reviewing court. In practice, however, an attorney does so by filing a motion with proof of service on the party represented and any other attorneys or unrepresented parties in the case. Revised rule 48(c) conforms to that practice, but the change is not substantive. To protect privacy, the proof of service need not include the address of the party represented.

Filling a gap, revised rule 48(c) provides that if a motion to withdraw is filed in any proceeding—whether appeal or original proceeding in the Court of Appeal—pending in the Supreme Court after grant of review, the Supreme Court clerk must also notify the Court of Appeal of any ruling on the motion.

Rule 51. Substitute trial judge

(a) Who may act

If these rules require an act to be done by the judge who tried the case and that judge is unavailable or unable to act at the required time, the act may be done by another judge of the same court in counties with more than one judge.

(b) Who must designate

(1) The presiding judge—or, if none, the senior judge—must designate the judge to act under (a).

(2) If no judge of the superior court in the county is available, the Chair of the Judicial Council must designate a judge to do the act.

Rule 52. Presumption from record

The reviewing court will presume that the record in an appeal includes all matters material to deciding the issues raised. If the appeal proceeds without a reporter's transcript, this presumption applies only if the claimed error appears on the face of the record.

Advisory Committee Comment

Rule 52 has been simplified and restated to reflect its intent as explained in the case law. (See, e.g., *Dumas v. Stark* (1961) 56 Cal.2d 673, 674.) No substantive change is intended.

Rule 53. Application and construction of rules

(a) Application

These rules apply to:

(1) appeals from superior courts;

(2) original proceedings, motions, applications, and petitions in the Courts of Appeal and Supreme Court; and

(3) unless inconsistent with rules 61–69, proceedings for transferring to the Court of Appeal for review cases within the appellate jurisdiction of the superior court.

(b) Construction

These rules must be liberally construed to ensure the just and speedy determination of the proceedings they govern.

(c) Amendments to statutes

In these rules a reference to a statute includes any subsequent amendments to the statute.

Advisory Committee Comment

Subdivision (c). Revised rule 53(c) fills a gap. It is derived from Evidence Code section 6.

Rule 54. Amendments to rules

Only the Judicial Council may amend these rules. An amendment must be published in the advance pamphlets of the Official Reports and takes effect on the date ordered by the Judicial Council.

Advisory Committee Comment

Former rule 54 stated that an amendment to these rules took effect 60 days after its first publication unless the Judicial Council ordered otherwise. That practice is no longer followed; currently, the Judicial Council specifies the effective date of an amendment in the order of the Council adopting it. Revised rule 54 reflects this practice.

Former rule 54 provided for the *withdrawal* of a rule amendment by the Judicial Council before its effective date. Revised rule 54 deletes this provision as obsolete: the Council neither uses nor needs the procedure. The Council retains the authority to repeal or modify a pending amendment at any time. The change is not substantive.

CHAPTER IV. Administrative Provisions Governing Reviewing Courts

Rule 70. Preservation and destruction of Court of Appeal records

(a) Form in which records may be preserved

(1) Court of Appeal records may be preserved in any appropriate medium, including paper or an optical, electronic, magnetic, photographic, or microphotographic medium or other technology capable of accurately reproducing the original. The medium used must comply with the minimum standards or guidelines for the preservation and reproduction of the medium adopted by the American National Standards Institute or the Association for Information and Image Management.

(2) If records are preserved in a medium other than paper, the following provisions of Government Code section 68150 apply: subdivisions (b)–(d); (f), excluding subdivision (f)(1); and (g)–(h).

(b) Permanent records

The Court of Appeal clerk must permanently keep the court's minutes and a register of appeals and original proceedings.

(c) Time to keep other records

(1) Except as provided in (2), the clerk may destroy all other records in a case 10 years after the decision becomes final, as ordered by the administrative presiding justice or, in a court with only one division, by the presiding justice.

(2) In a criminal case in which the court affirms a judgment of conviction, the clerk must keep the original reporter's transcript for 20 years after the decision becomes final.

Advisory Committee Comment

New rule 70 is former rule 55(a)–(b). Former rule 55(c) is now new rule 71.

Rule 71. Court of Appeal minutes

(a) Purpose

Court of Appeal minutes should record the court's significant public acts and permit the public to follow the major events in the history of cases coming before the court.

(b) Required contents of minutes

The minutes must include:

(1) the filing date of each opinion, showing whether it was ordered published;

(2) orders granting or denying rehearings or modifying opinions;

(3) orders affecting an opinion's publication status if issued after the opinion was filed;

(4) summaries of all courtroom proceedings, showing at a minimum:

(A) the cases called for argument;

(B) the justices hearing argument;

(C) the name of the attorney arguing for each party;

(D) whether the case was submitted at the close of argument or the court requested further briefing;

(5) the date of submission if other than the date of argument;

(6) orders vacating submission, including the reason for vacating and the resubmission date;

(7) orders dismissing appeals for lack of jurisdiction;

(8) orders consolidating cases;

(9) orders affecting a judgment or its finality date; and

(10) orders changing or correcting any of the above.

(c) Optional contents

At the court's discretion, the minutes may include such other matter as:

(1) assignments of justices by the Chief Justice;

(2) reports of the Commission on Judicial Appointments confirming justices; and

(3) memorials.

Advisory Committee Comment

New rule 71 is former rule 55(c).

Subdivision (b). Revised rule 71(b)(5) fills a gap but is not a substantive change. Former rule 55(c)(6) has been deleted as inconsistent with current practice: "clerical errors" are not corrected by court *order* and do not require *modification* of a published opinion. Former rule 55(c)(7) required the minutes to reflect any orders dismissing appeals for lack of jurisdiction "unless the lack of jurisdiction is patent and uncontested"; because any order dismissing an appeal for lack of jurisdiction should be noted in the minutes, revised rule 71(b)(7) omits the exception.

Rule 75. Court of Appeal administrative presiding justice

(a) Designation

(1) In a Court of Appeal with more than one division, the Chief Justice may designate a presiding justice to act as administrative presiding justice. The administrative presiding justice serves at the pleasure of the Chief Justice for the period specified in the designation order.

(2) The administrative presiding justice must designate another member of the court to serve as acting administrative presiding justice in the administrative presiding justice's absence; if the administrative presiding justice does not make that designation, the Chief Justice must do so.

(3) In a Court of Appeal with only one division, the presiding justice acts as the administrative presiding justice.

(b) Responsibilities

The administrative presiding justice is responsible for leading the court, establishing policies, promoting access to justice for all members of the public, providing a forum for the fair and expeditious resolution of disputes, and maximizing the use of judicial and other resources.

(c) Duties

The administrative presiding justice must perform any duties delegated—with the Chief Justice's concurrence—by a majority of the justices in the district. In addition, the administrative presiding justice:

(1) *Personnel*: has general direction and supervision of the clerk/administrator and all court employees except those assigned to a particular justice or division;

(2) *Unassigned matters*: has the authority of a presiding justice with respect to any matter that has not been assigned to a particular division;

(3) *Judicial Council*: cooperates with the Chief Justice and any officer authorized to act for the Chief Justice in connection with the making of reports and the assignment of judges or retired judges under Article VI, section 6, of the California Constitution;

(4) *Transfer of cases*: cooperates with the Chief Justice in expediting judicial business and equalizing the work of judges by recommending, when

appropriate, the transfer of cases by the Supreme Court under Article VI, section 12, of the California Constitution;

(5) *Administration*: supervises the administration of the court's day-to-day operations, including personnel matters, but must secure the approval of a majority of the justices in the district before implementing any change in court policies;

(6) *Budget*: has sole authority in the district over the budget as allocated by the Chair of the Judicial Council, including but not limited to budget transfers, execution of purchase orders, obligation of funds, and approval of payments; and

(7) *Facilities*: except as provided in (d), has sole authority in the district over the operation, maintenance, renovation, expansion and assignment of all facilities used and occupied by the district.

(d) Geographically separate divisions

Under the general oversight of the administrative presiding justice, the presiding justice of a geographically separate division:

(1) generally directs and supervises all division court employees not assigned to a particular justice;

(2) has authority to act on behalf of the division regarding day-to-day operations;

(3) administers the division budget for day-to-day operations, including expenses for maintenance of facilities and equipment; and

(4) operates, maintains, and assigns space in all facilities used and occupied by the division.

Advisory Committee Comment

Revised rule 75 combines former rules 75 and 76.

Rule 76.1. Reviewing court clerk/administrator

(a) Selection

A reviewing court may employ a clerk/administrator selected in accordance with procedures adopted by the court.

(b) Responsibilities

Acting under the general direction and supervision of the administrative presiding justice, the clerk/administrator is responsible for planning, organizing, coordinating, and directing, with full authority and accountability, the management of the clerk's office and all nonjudicial support activities in a manner that promotes access to justice for all members of the public, provides a forum for the fair and expeditious resolution of disputes, and maximizes the use of judicial and other resources.

(c) Duties

Under the direction of the administrative presiding justice, the clerk/administrator:

(1) *Personnel*: directs and supervises all court employees assigned to the clerk/administrator by the administrative presiding justice and ensures that the court receives a full range of human resources support;

(2) *Budget*: develops, administers, and monitors the court budget and develops practices and procedures to ensure that annual expenditures are within the budget;

(3) *Contracts*: negotiates contracts on the court's behalf in accord with established contracting procedures and applicable laws;

(4) *Calendar management*: employs and supervises efficient calendar and caseflow management, including analyzing and evaluating pending caseloads and recommending effective calendar management techniques;

(5) *Technology*: coordinates technological and automated systems activities to assist the court;

(6) *Facilities*: coordinates facilities, space planning, court security, and business services support, including the purchase and management of equipment and supplies;

(7) *Records*: creates and manages uniform record-keeping systems, collecting data on pending and completed judicial business and the court's internal operation as the court and Judicial Council require;

(8) *Recommendations*: identifies problems and recommends policy, procedural, and administrative changes to the court;

(9) *Public relations*: represents the court to internal and external customers—including the other branches of government—on issues pertaining to the court;

(10) *Liaison*: acts as liaison with other governmental agencies;

(11) *Committees*: provides staff for judicial committees;

(12) *Administration*: develops and implements administrative and operational programs and policies for the court and the clerk's office; and

(13) *Other*: performs other duties as the administrative presiding justice directs.

(d) Geographically separate divisions

Under the general oversight of the clerk/administrator, an assistant clerk/administrator of a geographically separate division has responsibility for the nonjudicial support activities of that division.

Rule 76.5. Appointment of appellate counsel

(a) Procedures

(1) Each reviewing court must adopt procedures for the appointment of appellate counsel for indigents not represented by the State Public Defender in all cases in which indigents are entitled to such appointment.

(2) The procedures must require each attorney seeking appointment to complete a questionnaire showing the attorney's date of admission to the bar, qualifications, and experience.

(b) List of qualified attorneys

(1) The reviewing court must evaluate the attorney's qualifications for appointment and place the attorney's name on a list to receive appointments in appropriate cases.

(2) Each Court of Appeal must maintain a list with at least two levels based on the experience and qualifications of the attorneys, in order to match the attorney to the demands of the case. In establishing the list and levels the court must consider the guidelines in section 20 of the Standards of Judicial Administration.

(c) Evaluation

The court must review and evaluate the performance of appointed counsel to determine whether counsel's name should remain at the same level, be placed on a different level, or be deleted from the list.

(d) Contracts to perform administrative functions

(1) The court may contract with an administrator having substantial experience in handling appellate court appointments to perform the functions stated in this rule.

(2) The guidelines in section 20 of the Standards of Judicial Administration need not be followed if the contract provides for a qualified attorney to consult with and assist appointed counsel concerning the issues on appeal and appellant's opening brief.

(3) The court must provide the administrator with information needed to fulfill the administrator's duties. If the administrator is to provide review and evaluation under (c), the court must notify the administrator of any superior or substandard performance by appointed counsel.

Advisory Committee Comment

Subdivision (a). On its face, former rule 76.5 limited its applicability to appeals in criminal cases, but in practice the rule was also applied to appeals in certain juvenile, mental health, paternity, and other cases in which indigent appellants were entitled to appointed appellate counsel. Reflecting that practice, revised rule 76.5(a) declares that the rule applies "in all cases in which indigents are entitled to such appointment."

Subdivision (b). Former rule 76.5(b) required the Court of Appeal to maintain "one or more lists" of attorneys to receive appointments to represent indigent appellants. Consistently with actual practice, revised rule 76.5(b) instead directs the Court of Appeal to maintain one list of such attorneys divided into several "levels" based on their experience and qualifications. The change is not substantive.

Subdivision (c). Former rule 76.5(c) required the Court of Appeal to evaluate the performance of each appointed counsel to determine whether counsel's name should remain "on the same appointment list, be placed on a different list," or be deleted. Consistently with the usage adopted in revised rule 76.5(b), discussed above, revised rule 76.5(c) instead directs the Court of Appeal to determine whether counsel's name should remain "at the same level, be placed on a different level," or be deleted. The change is not substantive.

Rule 76.6. Qualifications of counsel in death penalty appeals and habeas corpus proceedings

(a) Purpose

This rule defines the minimum qualifications for attorneys appointed by the Supreme Court in death penalty appeals and habeas corpus proceedings related to sentences of death. An attorney is not entitled to appointment simply because the minimum qualifications are met.

(b) General qualifications

The Supreme Court may appoint an attorney only if, after reviewing the attorney's experience, writing samples, references, and evaluations under (d) through (f), the court determines that the attorney has demonstrated the commitment, knowledge, and skills necessary to competently represent the defendant. An appointed attorney must be willing to cooperate with an assisting counsel or entity the court may designate.

(c) Definitions

As used in this rule:

(1) "Appointed counsel" or "appointed attorney" means an attorney appointed to represent a person in a death penalty appeal or death penalty related habeas corpus proceedings in the Supreme Court. Appointed counsel may be either lead counsel or associate counsel.

(2) "Lead counsel" means an appointed attorney or an attorney in the Office of the State Public Defender, the Habeas Corpus Resource Center, or the California Appellate Project in San Francisco, who is responsible for the overall conduct of the case and for supervising the work of associate and supervised counsel. If two or more attorneys are appointed to represent a defendant jointly in a death penalty appeal, in death penalty related

habeas corpus proceedings, or in both classes of proceedings together, one such attorney will be designated as lead counsel.

(3) "Associate counsel" means an appointed attorney who does not have the primary responsibility for the case, but nevertheless has casewide responsibility commensurate with the scope of that counsel's appointment as attorney of record. Associate counsel must meet the same minimum qualifications as lead counsel.

(4) "Supervised counsel" means an attorney who works under the immediate supervision and direction of lead or associate counsel, but is not appointed by the Supreme Court. Supervised counsel must be an active member of the State Bar of California.

(5) "Assisting counsel or entity" means an attorney or entity designated by the Supreme Court to provide outside consultation and resource assistance to appointed counsel. Entities that may be designated include the Office of the State Public Defender, the Habeas Corpus Resource Center, and the California Appellate Project in San Francisco.

(d) Qualifications for appointed appellate counsel

An attorney appointed in a death penalty appeal, as either lead or associate counsel, must have at least the following qualifications and experience:

(1) Active practice of law in California for at least four years.

(2) Either:

(A) service as counsel of record for a defendant in seven completed felony appeals, including one murder case; or

(B) service as counsel of record for a defendant in five completed felony appeals and as supervised counsel for a defendant in two death penalty appeals in which the opening brief has been filed. Service as supervised counsel in a death penalty appeal will apply toward this qualification only if lead or associate counsel in that appeal attests that the supervised attorney has performed substantial work on the case and recommends the attorney for appointment.

(3) Familiarity with Supreme Court practices and procedures, including those related to death penalty appeals.

(4) Within three years before appointment, completion of at least nine hours of Supreme Court-approved appellate criminal defense training, continuing education, or course of study, at least six hours of which involve death penalty appeals. If the Supreme Court has previously appointed counsel to represent a defendant in a death penalty appeal or a related habeas corpus proceeding, and counsel has provided active representation within three years before the request for a new appointment, the court, after reviewing counsel's previous work, may find that such representation constitutes compliance with this requirement.

(5) Proficiency in issue-identification, research, analysis, writing, and advocacy, taking into consideration all the following:

(A) two writing samples, ordinarily appellate briefs, written by the attorney and presenting an analysis of complex legal issues;

(B) if the attorney has previously been appointed in a death penalty appeal or death penalty related habeas corpus proceeding, the evaluation of the assisting counsel or entity in that proceeding;

(C) recommendations from two attorneys familiar with the attorney's qualifications and performance; and

(D) if the attorney is on a panel of attorneys eligible for appointments to represent indigents in the Court of Appeal, the evaluation of the administrator responsible for those appointments.

(e) Qualifications for appointed habeas corpus counsel

An attorney appointed to represent a person in death penalty related habeas corpus proceedings, as either lead or associate counsel, must have at least the following qualifications and experience:

(1) Active practice of law in California for at least four years.

(2) Either:

(A) service as counsel of record for a defendant in five completed felony appeals or writ proceedings, including one murder case, and service as counsel of record for a defendant in three jury trials or three habeas corpus proceedings involving serious felonies; or

(B) service as counsel of record for a defendant in five completed felony appeals or writ proceedings and service as supervised counsel in two death penalty related habeas corpus proceedings in which the petition has been filed. Service as supervised counsel in a death penalty related habeas corpus proceeding will apply toward this qualification only if lead or associate counsel in that proceeding attests that the attorney has performed substantial work on the case and recommends the attorney for appointment.

(3) Familiarity with the practices and procedures of the California Supreme Court and the federal courts in death penalty related habeas corpus proceedings;

(4) Within three years before appointment, completion of at least nine hours of Supreme Court-approved appellate criminal defense or habeas corpus defense training, continuing education, or course of study, at least six hours of which address death penalty habeas corpus proceedings. If the Supreme Court previously has appointed counsel to represent a defendant in a death penalty appeal or a related habeas corpus proceeding, and counsel has provided active representation within three years before the request for a new appointment, the court, after reviewing counsel's previous work, may find that such representation constitutes compliance with this requirement.

(5) Proficiency in issue-identification, research, analysis, writing, investigation, and advocacy, taking into consideration all the following:

(A) three writing samples, ordinarily two appellate briefs and one habeas corpus petition, written by the attorney and presenting an analysis of complex legal issues;

(B) if the attorney has previously been appointed in a death penalty appeal or death penalty related habeas corpus proceeding, the evaluation of the assisting counsel or entity in that proceeding;

(C) recommendations from two attorneys familiar with the attorney's qualifications and performance; and

(D) if the attorney is on a panel of attorneys eligible for appointments to represent indigent appellants in the Court of Appeal, the evaluation of the administrator responsible for those appointments.

(f) Alternative qualifications

The Supreme Court may appoint an attorney who does not meet the requirements of (d)(1) and (d)(2) or (e)(1) and (e)(2) if the attorney has the qualifications described in (d)(3) through (d)(5) or (e)(3) through (e)(5) and:

(1) The court finds that the attorney has extensive experience in another jurisdiction or a different type of practice (such as civil trials or appeals, academic work, or work for a court or prosecutor) for at least four years, providing the attorney with experience in complex cases substantially equivalent to that of an attorney qualified under (d) or (e).

(2) Ongoing consultation is available to the attorney from an assisting counsel or entity designated by the court.

(3) Within two years before appointment, the attorney has completed at least 18 hours of Supreme Court-approved appellate criminal defense or habeas corpus defense training, continuing education, or course of study, at least nine hours of which involve death penalty appellate or habeas corpus proceedings. The Supreme Court will determine in each case whether the training, education, or course of study completed by a particular attorney satisfies the requirements of this subdivision in light of the attorney's individual background and experience. If the Supreme Court has previously appointed counsel to represent a defendant in a death penalty appeal or a related habeas corpus proceeding, and counsel has provided active representation within three years before the request for a new appointment, the court, after reviewing counsel's previous work, may find that such representation constitutes compliance with this requirement.

(g) Attorneys without trial experience

If an attorney appointed under either (e) or (f) to represent a defendant in death penalty related habeas corpus proceedings does not have experience in conducting trials or evidentiary hearings, the attorney must associate an attorney who has such experience if an evidentiary hearing is ordered in the habeas corpus proceeding.

(h) Use of supervised counsel

An attorney who does not meet the qualifications described in (d), (e), or (f) may assist lead or associate counsel, but must work under the immediate supervision and direction of lead or associate counsel.

(i) Appellate and habeas corpus appointment

(1) An attorney appointed to represent a defendant in both a death penalty appeal and death penalty related habeas corpus proceedings must meet the minimum qualifications of both (d) and (e), or of (f).

(2) Notwithstanding (1), two attorneys together may be eligible for appointment to represent a defendant jointly in both a death penalty appeal and death penalty related habeas corpus proceedings if the Supreme Court finds that their qualifications in the aggregate satisfy the provisions of both (d) and (e), or of (f).

(j) Designated entities as appointed counsel

(1) Notwithstanding any other provision of this rule, the State Public Defender is qualified to serve as appointed counsel in death penalty appeals, the Habeas Corpus Resource Center is qualified to serve as appointed counsel in death penalty related habeas corpus proceedings, and the California Appellate Project in San Francisco is qualified to serve as appointed counsel in both classes of proceedings.

(2) When serving as appointed counsel in a death penalty appeal, the State Public Defender or the California Appellate Project in San Francisco must not assign any attorney as lead counsel unless it finds the attorney qualified under (d)(1) through (d)(5) or the Supreme Court finds the attorney qualified under (f).

(3) When serving as appointed counsel in a death penalty related habeas corpus proceeding, the Habeas Corpus Resource Center or the California Appellate Project in San Francisco must not assign any attorney as lead counsel unless it finds the attorney qualified under (e)(1) through (e)(5) or the Supreme Court finds the attorney qualified under (f).

(k) Attorney appointed by federal court

Notwithstanding any other provision of this rule, the Supreme Court may appoint an attorney who is under appointment by a federal court in a death penalty related habeas corpus proceeding for the purpose of exhausting state remedies in the Supreme Court and for all subsequent state proceedings in that case, if the Supreme Court finds the attorney has the commitment, proficiency, and knowledge necessary to represent the defendant competently in state proceedings.

Advisory Committee Comment

Subdivision (c). The definition of "associate counsel" in revised rule 76.6(c)(3) adds the words, "but nevertheless has casewide responsibility commensurate with the scope of that counsel's appointment as attorney of record." The provision is intended to make it clear that although appointed lead counsel has overall and supervisory responsibility in a capital case, appointed associate counsel also has casewide responsibility within the scope of his or her appointment as either appellate counsel, habeas corpus counsel, or appellate *and* habeas corpus counsel. The change is not substantive.

Rule 77. Supervising progress of appeals

(a) Duty to ensure prompt filing

Each administrative presiding justice of a Court of Appeal with more than one division located in the same city, and the presiding justices of all other Courts of Appeal, are generally responsible for ensuring that all appellate records and briefs are promptly filed. Staff must be provided for that purpose, to the extent funds are appropriated and available.

(b) Authority

Notwithstanding any other rule, the administrative presiding justices and presiding justices referred to in (a) may:

(1) grant or deny applications to extend the time to file records, briefs, and other documents, except that a presiding justice may extend the time to file briefs in conjunction with an order to augment the record;

(2) order the dismissal of an appeal or any other authorized sanction for noncompliance with these rules, if no application to extend time or for relief from default has been filed before the order is entered; and

(3) grant relief from default or from a sanction other than dismissal imposed for the default.

Rule 78. Notice of failure to perform judicial duties

(a) Notice

The Chief Justice or presiding justice of a reviewing court, or the administrative presiding justice in the case of a presiding justice, must notify the Commission on Judicial Performance of any reviewing court justice's:

(1) substantial failure to perform judicial duties, including any habitual neglect of duty, or

(2) disability-caused absences totaling more than 90 court days in a 12-month period, excluding absences for authorized vacations and for attending schools, conferences, and judicial workshops.

(b) Copy to justice

The Chief Justice, presiding justice, or administrative presiding justice must give the affected justice a copy of any notice under (a).

Rule 80. Local rules of Courts of Appeal

(a) California Rules of Court prevail

A Court of Appeal must accept for filing a record, brief, or other document complying with the California Rules of Court despite any local rule imposing other requirements.

(b) Publication

(1) A Court of Appeal must submit any local rule it adopts to the Reporter of Decisions for publication in the advance pamphlets of the Official Reports.

(2) As used in this rule, publication means printing in the same manner as amendments to the California Rules of Court.

(c) Effective date

A local rule cannot take effect sooner than 45 days after the publication date of the advance pamphlet in which it is printed.

TITLE 3. Miscellaneous Rules

DIVISION III. Rules for Publication of Appellate Opinions

Rule 976. Publication of appellate opinions

(a) Supreme Court

All opinions of the Supreme Court are published in the Official Reports.

(b) Courts of Appeal and appellate divisions

Except as provided in (d), an opinion of a Court of Appeal or a superior court appellate division is published in the Official Reports if a majority of the rendering court certifies the opinion for publication before the decision is final in that court.

(c) Standards for certification

No opinion of a Court of Appeal or a superior court appellate division may be certified for publication in the Official Reports unless the opinion:

(1) establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in published opinions, or modifies, or criticizes with reasons given, an existing rule;

(2) resolves or creates an apparent conflict in the law;

(3) involves a legal issue of continuing public interest; or

(4) makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law.

(d) Changes in publication status

(1) Unless otherwise ordered under (2), an opinion is no longer considered published if the Supreme Court grants review or the rendering court grants rehearing.

(2) The Supreme Court may order that an opinion certified for publication is not to be published or that an opinion not certified is to be published. The Supreme Court may also order publication of an opinion, in whole or in part, at any time after granting review.

(e) Editing

(1) Computer versions of all opinions of the Supreme Court and Courts of Appeal must be provided to the Reporter of Decisions on the day of filing. Opinions of superior court appellate divisions certified for publication must be provided as prescribed in rule 106.

(2) The Reporter of Decisions must edit opinions for publication as directed by the Supreme Court. The Reporter of Decisions must submit edited opinions to the courts for examination, correction, and approval before finalization for the Official Reports.

Advisory Committee Comment

Subdivision (b). In revised rule 976(b) and throughout the rules on publication of appellate opinions, the phrase "a majority of the rendering court" means a majority of the panel of appellate justices who participated in the decision.

Subdivision (e). Revised rule 976(e) reflects current practice. No substantive change is intended.

Rule 976.1. Partial publication

(a) Order for partial publication

A majority of the rendering court may certify for publication any part of an opinion meeting a standard for publication under rule 976.

(b) Opinion contents

The published part of the opinion must specify the part or parts not certified for publication. All material, factual and legal, including the disposition, that aids in the application or interpretation of the published part must be published.

(c) Construction

For purposes of rules 976, 977, and 978, the published part of the opinion is treated as a published opinion and the unpublished part as an unpublished opinion.

Rule 977. Citation of opinions

(a) Unpublished opinion

Except as provided in (b), an opinion of a California Court of Appeal or superior court appellate division that is not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action.

(b) Exceptions

An unpublished opinion may be cited or relied on:

(1) when the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel, or

(2) when the opinion is relevant to a criminal or disciplinary action because it states reasons for a decision affecting the same defendant or respondent in another such action.

(c) Citation procedure

A copy of an opinion citable under (b) or of a cited opinion of any court that is available only in a computer-based source of decisional law must be furnished to the court and all parties by attaching it to the document in which it is cited or, if the citation will be made orally, by letter within a reasonable time in advance of citation.

(d) When a published opinion may be cited

A published California opinion may be cited or relied on as soon as it is certified for publication or ordered published.

Advisory Committee Comment

A footnote to the published version of former rule 977(d) stated that a citation to an opinion ordered published by the Supreme Court after grant of review should include a reference to the grant of review and to any subsequent Supreme Court action in the case. Revised rule 977 deletes this footnote because it was not part of the rule itself and the event it describes rarely occurs in practice.

Rule 978. Requesting publication of unpublished opinions

(a) Request

(1) Any person may request that an unpublished opinion be ordered published.

(2) The request must be made by a letter to the court that rendered the opinion, concisely stating the person's interest and the reason why the opinion meets a standard for publication.

(3) The request must be delivered to the rendering court within the time allowed to file a petition for rehearing in that court.

(4) The request must be served on all parties.

(b) Action by rendering court

(1) If the rendering court does not or cannot grant the request before the decision is final in that court, it must forward the request to the Supreme Court with a copy of its opinion, its recommendation for disposition, and a brief statement of its reasons. The rendering court must forward these materials within 15 days after the decision is final in that court.

(2) The rendering court must also send a copy of its recommendation and reasons to all parties and any person who requested publication.

(c) Action by Supreme Court

(1) The Supreme Court may order the opinion published or deny the request. If the rendering court denies or recommends denying the request, the Supreme Court normally will not order publication.

(2) The Supreme Court must send notice of its action to the rendering court, all parties, and any person who requested publication.

(d) Effect of Supreme Court order to publish

A Supreme Court order to publish is not an expression of the court's opinion of the correctness of the result of the decision or of any law stated in the opinion.

Advisory Committee Comment

Subdivision (a). Former rule 978(a) required generally that a publication request be made "promptly," but in practice the term proved so vague that requests were often made after the Court of Appeal had lost jurisdiction. To assist persons intending to request publication and to give the Court of

Appeal adequate time to act, revised rule 978(a)(3) specifies that the request must be made within the time allowed to file a petition for rehearing in the reviewing court, e.g., under rule 25(b). The change is substantive.

Subdivision (b). Former rule 978(a) did not specify the time within which the Court of Appeal was required to forward to the Supreme Court a publication request that it had not or could not have granted. In practice, however, it was not uncommon for the court to forward such a request after the Supreme Court had denied a petition for review in the same case or, if there was no such petition, had lost jurisdiction to grant review on its own motion. To assist the Supreme Court in timely processing publication requests, therefore, revised rule 978(b)(1) requires the Court of Appeal to forward the request within 15 days after the decision is final in that court. The change is substantive.

Subdivision (c). Revised rule 978(c)(1) recognizes (see also former rule 978(b)) that on receiving a publication request the Supreme Court may either order the opinion published or deny the request. In practice, however, the Supreme Court rarely orders an opinion published if the rendering court denies a request to publish it. Reflecting that practice, revised rule 978(c)(1) states that if the rendering court denies such a request, "the Supreme Court normally will not order publication." (Compare rule 28(c).)

Rule 979. Requesting depublication of published opinions

(a) Request

(1) Any person may request the Supreme Court to order that an opinion certified for publication not be published.

(2) The request must not be made as part of a petition for review, but by a separate letter to the Supreme Court not exceeding 10 pages.

(3) The request must concisely state the person's interest and the reason why the opinion should not remain published.

(4) The request must be delivered to the Supreme Court within 30 days after the decision is final in the Court of Appeal.

(5) The request must be served on the rendering court and all parties.

(b) Response

(1) Within 10 days after the Supreme Court receives a request under (a), the rendering court or any person may submit a response supporting or opposing the request. A response submitted by anyone other than the rendering court must state the person's interest.

(2) A response must not exceed 10 pages and must be served on the rendering court, all parties, and any person who requested depublication.

(c) Action by Supreme Court

(1) The Supreme Court may order the opinion depublished or deny the request. It must send notice of its action to the rendering court, all parties, and any person who requested depublication.

(2) The Supreme Court may order an opinion depublished on its own motion, notifying the rendering court of its action.

(d) Effect of Supreme Court order to depublish

A Supreme Court order to depublish is not an expression of the court's opinion of the correctness of the result of the decision or of any law stated in the opinion.

Advisory Committee Comment

Subdivision (b). Former rule 979(a) required depublication requests to be made "by letter to the Supreme Court," but in practice many were incorporated in petitions for review. To clarify and emphasize the requirement, revised rule 979(a)(3) specifically states that the request "must not be made as part of a petition for review, but by a separate letter to the Supreme Court . . ." The change is not substantive.

PROPOSED AMENDMENTS

Rule 2. Time to appeal

(a) * * *

(b) No extension of time; late notice of appeal

Except as provided in rule 45.1, no court may extend the time to file a notice of appeal. If a notice of appeal is filed late, the reviewing court must dismiss the appeal.

~~(b)~~(c) * * *

~~(c)~~(d) * * *

~~(d)~~(e) * * *

~~(e) Late notice of appeal~~

~~If a notice of appeal is filed late, the reviewing court must dismiss the appeal.~~

(f) Appealable order

As used in (a) and ~~(d)~~(e), "judgment" includes an appealable order if the appeal is from and appealable order.

Rule 15. Service and filing of briefs

(a) - (b) * * *

(c) Service

(1) * * *

(2) ~~Five~~ Four copies of each brief filed in a civil appeal must be served on the Supreme Court. If the Court of Appeal has ordered the brief sealed:

(A) the party serving the brief must place all four copies of the brief in a sealed envelope and attach a cover sheet that contains the information required by rule 14(b)(10) and labels the contents as "CONDITIONALLY UNDER SEAL," and

(B) the Court of Appeal clerk must promptly notify the Supreme Court of any court order unsealing the brief. In the absence of such notice the Supreme Court clerk must keep all copies of the brief under seal.

(3) * * *

Rule 30.1. Time to appeal

(a) Normal time

Unless otherwise provided by law, a notice of appeal must be filed within 60 days after the rendition of the judgment or the making of the order being appealed. Except as provided in rule 45.1, no court may extend the time to file a notice of appeal.

(b) - (d) * * *